85732-6

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

No. 63572-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROGELIO H.A. RUVALCABA and ELAINE H. RUVALCABA, husband and wife,

Respondents,

v.

KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and ARNE S. IJPMA and STEW LOON, husband and wife, and JOHN A. DYER and PAULINE T. DYER, husband and wife; and STEPHEN KLEPPER and KAREN KLEPPER, husband and wife, and STEVEN J. DAY and CATHERINE L. DAY, husband and wife, and LIVINGSTON ENTERPRISES, LLC, an Alabama limited liability company, KAREN M. OMODT, a single woman, MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife, and CARL E. JOHNSON and PHYLLIS JOHNSON, husband and wife,

Petitioners,

WILLIAM V. KITCHIN and CHERYL L. KITCHIN, husband and wife,

Respondents.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By Howard M. Goodfriend
WSBA No. 14355

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

PEPPLE JOHNSON CANTU
& SCHMIDT PLLC

By: Jackson Schmidt
WSBA No. 16848

1501 Western Avenue, Suite 600
Seattle, WA 98101
206.625.1711

Attorneys for Petitioners

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I. IDENTITY OF PETITIONERS

The petitioners are Kwang Ho Baek and Lyung Sook Baek, husband and wife; Arne S. Ijpma and Stew Loon, husband and wife; John A. Dyer and Pauline T. Dyer, husband and wife; Steven J. Day and Catherine L. Day, husband and wife; Livingston Enterprises, LLC, an Alabama limited liability company; Karen M. Omodt, a single woman; Matthew Golden and Jane Borkowski, husband and wife; and Carl E. Johnson and Phyllis Johnson, husband and wife ("Day Group Petitioners"). The Day Group Petitioners were defendants in the trial court, and respondents in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its published opinion on January 31, 2011. A copy of the slip opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

May a landowner condemn a private way of necessity over the land of his neighbors 37 years after voluntarily landlocking his property by dividing it and selling that portion which has access to a public road without reserving an easement across the severed parcel?

IV. STATEMENT OF FACTS.

A. The Ruvalcabas Voluntarily Landlocked Their Property In 1971.

In 1965, Respondents Rogelio and Elaine Ruvalcaba purchased land in Seattle that gave them access to 42nd Avenue NE, which abutted the property to the east. (*See* CP 250-52, 266, 291, 387) Six years later, in 1971, they sold a portion of that property ("the Severed Parcel") to Melvin and Arlene Desmereaux. (CP 267, 387) The respective properties, and those of the Day Petitioners are shown on the map attached as Appendix B. (CP 190)

The Severed Parcel (or "Access Parcel" on App. B), comprising the eastern portion of the Ruvalcabas' property, had access to 42nd Avenue NE. The Ruvalcabas retained the remaining portion of the property ("the Landlocked Parcel"), which is surrounded by other residential properties to the north, south and west. Numerous other residential properties, some of which are now owned by the Day Petitioners, lie between the Landlocked Parcel and, to its north, NE 135th Street, the other nearby public road.

The Ruvalcabas did not create an easement across the Severed Parcel to 42nd Avenue NE during the six years in which

they owned the entire property. They did not reserve an easement from the Desmereauxs when they sold the Severed Parcel in 1971. (CP 267) They did not obtain an easement from their neighbors to the north giving them access to NE 135th Street before selling the Severed Parcel.

B. In 2007, The Court Of Appeals Affirmed Dismissal Of The Ruvalcabas' Common Law Action Against Petitioners.

The Ruvalcabas waited 35 years until March 2006, but they still did not sue the Desmereauxs or their successors to the Severed Parcel, when they finally decided to seek access to a public road. Instead, claiming that their Landlocked Parcel was amenable to development, the Ruvalcabas sought access to NE 135th Street via a common law implied easement by necessity across the properties of their northern neighbors, the Day Petitioners. King County Superior Court Judge Michael Fox dismissed their action and denied the Ruvalcabas' motion to amend their complaint to assert a statutory private condemnation claim, on the ground that their claims had accrued in 1971 and were time barred.

The Court of Appeals affirmed the dismissal, but on a different ground. ***Ruvalcaba v. Kwang Ho Baek***, 140 Wn. App.

1021, 2007 WL 2411691 (2007) (Appendix C). The court held that a common law implied easement of necessity could only be imposed upon the Severed Parcel and, because they had not named as defendants the Desmereaux or their successors, the Ruvalcabas' claim failed as a matter of law. (App. C. at p.2)

Because they had not sued the owners of the Severed Parcel, the Ruvalcabas had never obtained a judicial determination that access through the Severed Parcel is unreasonable. The Court of Appeals held that even though the Ruvalcabas' delay was "egregious," the trial court should not have dismissed the Ruvalcabas' complaint with prejudice because "[i]t was unnecessary to determine the [statute of] limitations issue in order to dismiss the original action or the motions to join or amend." (App. C. at p.4):

> Application of the limitations issue is best left to another day. While the delay here in bringing a statutory action seeking a private way of necessity was egregious, the public policy to prevent landlocked property from being rendered useless may override the application of any limitations statute. But this is an issue of first impression in this state and it deserves a fully developed record as well as argument and briefing.

(App. C at p.4)

C. The Court Of Appeals Reversed The Dismissal Of The Ruvalcabas' New Statutory Private Condemnation Action, Brought In 2008.

In July 2008, the Ruvalcabas again sued the Day Petitioners, asserting a statutory claim for condemnation of an easement. (CP 1-67) Once again the Ruvalcabas did not name the owners of the Severed Parcel or bring a separate claim against them for a declaratory judgment. On the Day Petitioners' motion, the trial court ordered the Ruvalcabas to name the owners of the Severed Parcel (William and Cheryl Kitchen) as necessary parties. (CP 78-83, 113-14) The Ruvalcabas' amended complaint raised alternative claims for a statutory easement by necessity over the Day Petitioners' property on the ground that access across the Severed Parcel was unreasonable, or for an implied easement by necessity over the Severed Parcel. (CP 130-68)

The Day Petitioners sought summary judgment, arguing that because the Ruvalcabas had voluntarily landlocked their property, plaintiffs could not establish that a statutory easement was "reasonably necessary," and that their claim was time barred by the statute of limitations and by laches. (CP 289-309) The trial court granted the Day Petitioners' motion, holding that "one cannot create, by one's own action of landlocking one's property, the

'reasonable necessity' that is an element of the plaintiffs' case in a private condemnation of a way by necessity." (CP 473)[1]

The Court of Appeals reversed in a published decision. The court held that the Ruvalcabas' voluntary decision to landlock their property as well as their delay in seeking access to a public road, was only "a fact to be weighed with all other relevant evidence to determine the reasonable need for a way of necessity:"

> The very concept of reasonable necessity, as contrasted with absolute necessity, suggests a fact-driven inquiry generally to be decided on a case-by case basis. The facts of this case illustrate why. The availability and value, as a home site, of the property retained by Ruvalcabas may have changed dramatically between 1971 and the present. This in turn may have impacted the economic feasibility of constructing a road over the Severed Parcel over the same period of time. Since 1971 the costs and techniques for building roads up steep slopes relative to land values may also have changed.

(App. A, Op. at 10)

The Day Petitioners seek review.

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[1] The court also granted the motion for summary judgment made by the Kitchins, owners of the Severed Property, on the ground that any rights the Ruvalcabas might have to an implied easement by necessity over the Severed Property in 1971 were now extinguished. (CP 468-69) The Ruvalcabas did not challenge the Kitchins' dismissal on appeal.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

A. An Owner Who Voluntarily Landlocks Property Has No Right To Obtain The Access To A Public Road That The Owner Sold When Subdividing His Property.

The Court of Appeals erred in holding that the Ruvalcabas could sue the Day Petitioners in 2007 under the private condemnation statute to obtain the access they sold away with the Severed Parcel when they voluntarily landlocked their property in 1971. The Court of Appeals decision is inconsistent with this Court's interpretation of RCW ch. 8.24 and Article I, § 16 of the Washington Constitution, and with ***Olivo v. Rasmussen***, 48 Wn. App. 318, 322, 738 P.2d 333 (1987), in which Division Two allowed an owner to invoke RCW 8.24.010 only after being "forced into a landlocked situation." RAP 13.4(b)(1), (2), (3). By encouraging the subdivision of land without providing for access, the Court of Appeals' published decision breeds uncertainty and upsets the reasonable expectations of property owners. RAP 13.4(b)(4).

1. The Court Of Appeals Failed To Narrowly Construe RCW 8.24.010 To Protect Private Property Rights.

Washington provides a limited statutory remedy for an owner to take the land of another to establish a private way of necessity:

> An owner . . . of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity.

RCW 8.24.010.

The statute, and the constitutional provision upon which it is based, Art. 1, § 16, "declare a public policy against rendering landlocked property useless." ***Brown v. McAnally***, 97 Wn.2d 360, 367, 644 P.2d 1153 (1982). However, as this Court has repeatedly held, that policy is not absolute, because the right to condemn to obtain access is an exception to Art. 1, § 16's constitutional prohibition against taking private property for private use. ***Hallauer v. Spectrum Properties, Inc.***, 143 Wn.2d 126, 132-33, 18 P.3d 540 (2001).

Thus, RCW 8.24.010 must be narrowly construed:

> [RCW 8.24.010] is not a favored statute. . . [I]t must be borne in mind that, after all, this is a condemnation proceeding. We are taking the property of one man and giving it to another.

State ex rel. Carlson v. Superior Court for Kitsap County, 107 Wash. 228, 232, 181 Pac. 689 (1919). In ***Carlson***, this Court first limited the use of RCW 8.24.010 to benefit landlocked parcels, and strictly construed the statute to reverse an easement benefitting a

landlocked property owner who "had a less convenient and less practicable" means of access over his grantor's land. *See also*, ***Brown***, 97 Wn.2d at 370 (strictly construing RCW 8.24.010 and reversing grant of 50 foot easement for development of condemnor's property as far exceeding what is reasonably necessary.)

While purporting to follow the plain language of RCW 8.24.010, the Court of Appeals ignored these principles here. The language of the statute does not support the Court of Appeals' holding that the Legislature did not place *any* limitations on the private owners who may invoke the private condemnation statute. (Op. at 9) The Legislature limited the statutory right of action to "*owners* . . . of land which is so situate with respect to the land of another." RCW 8.24.010 (emphasis added). This language requires an examination of whether a private way of necessity is reasonably necessary with respect to the particular private owner, rather than to a particular property in the abstract. It thus requires an examination of the circumstances under which the particular owner's land became landlocked.

The Court of Appeals similarly misinterpreted the statutory requirement that a private taking must be "necessary for [the]

proper use and enjoyment" of the condemnor's property. This Court held in ***Brown*** that this "necessity" element of RCW 8.24.010 requires the condemnor to show that the proposed condemnation is "reasonably necessary under the facts of the case, as distinguished from merely convenient or advantageous." 97 Wn.2d at 367 (citations omitted). The requirement that such necessity rise above "mere convenience" supports an interpretation that limits the remedy to owners of land whose own actions do not create the "necessity" that is a condition to a private condemnation.

While acknowledging that RCW 8.24.010 is a "remedy of last resort," (Op. at 7), the Court of Appeals erred in broadly interpreting the statute to authorize the taking of private property by landowners whose own actions have created the very "necessity" that Art. 1, § 16 requires as a condition to a private taking. RAP 13.4(b)(3). The Court of Appeals decision conflicts with this Court's interpretation of RCW 8.24.010 as a narrow remedy by favoring owners whose property is landlocked through their own voluntary actions. RAP 13.4(b)(1).

2. The Court Of Appeals Decision Ignores The Basis For Division Two's Decision In *Olivo v. Rasmussen.*

The Court of Appeals stated that it was confronting an "issue of first impression in Washington," (Op. at 1), but it was not writing on an entirely clean slate. In ***Olivo v. Rasmussen***, 48 Wn. App. 318, 738 P.2d 333 (1987), Olivo faced the loss of all of his property in condemnation proceedings by the State, then accepted a settlement that allowed him to keep a small portion of landlocked property. Olivo then successfully sued to condemn a private way of necessity over the Rasmussens' adjoining parcel. Division Two rejected the Rasmussens' argument that the private condemnation action was barred because "Olivo voluntarily negotiated a deal with the State that left his parcel landlocked." ***Olivo***, 48 Wn. App. at 320. In an opinion authored by Judge (now Justice) Alexander, the court held that because Olivo faced the threat of losing his entire property in the State's condemnation action, Olivo's decision to landlock his property was not "voluntary:"

> The unchallenged findings in the case before us describe a situation where Olivo was faced with the distinct possibility of either losing his entire property in a condemnation action, or being forced into a landlocked situation. Olivo should not be punished for choosing what he believed was the "lesser of two evils" and reaching a settlement that left him

> landlocked, rather than await condemnation proceedings that very likely would have left him without any of his land.

Olivo, 48 Wn. App. at 322.

Here, the Court of Appeals correctly noted the conveyance that landlocked Olivo's property was caused by "pending litigation" – the State's condemnation action (Op. at 6 n.10) – but erred in discounting the significance of this distinguishing factor. The Ruvalcabas were not given a Hobson's choice of keeping their property or losing it to the State. Dr. Ruvalcaba admitted that he knowingly and deliberately landlocked his property in 1971, under no threat or compulsion whatsoever: "At the time, I decided to convey this property without reserving an ingress and egress easement." (CP 387)

The Court of Appeals decision is inconsistent with ***Olivo***. RAP 13.4(b)(2). This Court should grant review and hold that RCW 8.24.010 does not allow a landowner to invoke the power of the State to take the private property of another to obtain the access the condemnor freely and voluntarily conveyed away.

3. The Court Of Appeals Decision Makes For Poor Policy.

The Court of Appeals purported to interpret the statute to further "the beneficial use of land." (Op. at 9) But allowing one who

has voluntarily created a landlocked property to later seek the access that he or she previously chose not to secure does not encourage the productive use of land. To the contrary, the Court of Appeals promotes idle speculation in land by encouraging owners to subdivide their properties without investing in the access necessary to make their lands productive. Further, its decision impedes neighboring landowners' productive use of their own properties by breeding uncertainty and risk that their private property may be taken to benefit a neighbor.[2]

The Court of Appeals' holding that a condemning landowner's decision to voluntarily landlock property is only one of the factors that the court may consider in determining "reasonable necessity" impedes the productive use of property in another way. By ensuring that such claims will not be quickly disposed of on summary judgment, it will require landowners to devote substantial resources to resolving the issue of "reasonable necessity" at trial, and burden the courts with claims by those who seek to shift the costs of their development to their neighbors.

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[2] This bad policy is exacerbated by the appellate court's failure to impose any time limit on bringing the statutory claim. *See* Arg. §B, *infra*.

Relying on the principle that decisions from other states provide "little guidance for the construction of a Washington statute implementing a provision of our state constitution," (Op. at 8), the Court of Appeals refused to address the public policies that underlie these decisions. As a result, Washington is the only state to extend its statutory right of private condemnation to owners who have voluntarily landlocked their property. (Op. at 10)[3] The Arizona Court of Appeals decision in ***Gulotta*** is particularly instructive, because Arizona's constitutional provision, Art. 2, § 17, mirrors Washington's Art. 1, § 16,[4] and its private condemnation statute uses language quite similar to RCW 8.24.010. *See* Ariz.

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[3] *See* ***Mersac, Inc. v. National Hills Condominium Ass'n Inc.***, 267 Ga. 493, 480 S.E.2d 16 (1997) (developer's failure to reserve easement when it sold property, landlocking its remaining parcel, made condemnation of private way of necessity "otherwise unreasonable" under Georgia statute); ***Graff v. Scanlan***, 673 A.2d 1028 (Pa. Cmwlth 1996) ("landowners who *voluntarily* create their own hardship are precluded from condemning a private road over the land of others pursuant to" Pennsylvania Private Road Act) (emphasis in original); ***Gulotta v. Triano***, 125 Ariz. 144, 608 P.2d 81, 83 (Ariz. App. 1980) ("The necessity, if any, for a right-of-way across defendants' property was created by [plaintiff's] own voluntary act"); ***English Reality Co. v. Meyer***, 228 La. 423, 82 So.2d 698, 701 (1955) (refusing to authorize private condemnation of easement under Louisiana code where property's "enclosure is not a direct consequence of the location of the land but of the act of the party seeking the relief.")

[4] "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes." Ariz. Const. Art. 2 § 17.

Rev. Stat. § 12-1202(A).[5] In holding that Arizona's statute did not authorize a private condemnation by a plaintiff who had voluntarily landlocked his property, the Arizona Court of Appeals looked to this Court's cases strictly construing RCW 8.24.010 and refusing to allow a condemnation "merely to serve convenience and advantage." 508 P.2d at 83.

The Court of Appeals decision cannot be reconciled with this Court's decisions narrowly construing RCW 8.24.010 in ***Brown*** and ***Carlson***, or with Division Two's opinion in ***Olivo***. RAP 13.4(b)(1), (2). Division One's published decision, which discourages property owners who voluntarily subdivide their property from simultaneously securing a means of access, presents an issue under our state constitution that should be definitively resolved by this Court. RAP 13.4(b)(3), (4).

[5] While the Day Petitioners did not cite ***Gulotta*** or ***Mersac*** in their Brief of Respondents in the Court of Appeals, they clearly advanced the argument that RCW 8.24.010 should be narrowly construed in the same manner as other private condemnation statutes to avoid a taking of private property. (Day Resp. Br. 15-19) *See* ***Bennett v. Hardy***, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990) (appellants may advance new authority on appeal to support a position taken in trial court.)

B. The Court of Appeals Erred In Authorizing Private Condemnation Claims To Be Brought In Perpetuity.

1. The Court of Appeals Refused To Subject Private Condemnation Claims To Any Statute Of Limitations.

While it did not expressly address the Day Petitioners' statute of limitations argument, by allowing suit based on the current "economic feasibility of constructing a road over the [S]evered Parcel" and the current costs of road building "relative to land values" because "[t]he availability and value, as a home site, of the property retained by the Ruvalcabas may have changed" since 1971, (Op. at 10), the Court of Appeals has held that a private condemnation action is subject to no statute of limitations at all. This Court should accept review and reject this reasoning because it deprives owners adjacent to a landlocked property, or even several parcels away (App. B), of any measure of certainty.

The purpose of a statute of limitations is to instill finality and to avoid the assertion of stale claims. *See* ***Douchette v. Bethel School Dist.***, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). The Legislature is presumed to intend to impose some temporal limit to a cause of action. *See* ***Felder v. Casey***, 487 U.S. 131, 140, 108 S.Ct. 2302, 2308, 101 L.Ed.2d 123 (1988) ("Because statutes of limitation are among the universally familiar aspects of litigation

considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity.") Where the relief sought by plaintiff is a "creature of statute to which no other limitation provision applies," the courts apply the Legislature's "catch-all" two year statute for actions "not hereinbefore provided for." RCW 4.16.130; ***Thompson v. Wilson***, 142 Wn. App. 803, 812-13, 175 P.3d 1149 (2008) ("This [catch-all provision] serves the State's purpose to compel prompt litigation and not leave persons fearful of litigation unlimited by time.") (*quoting* ***Stenberg v. Pacific Power and Light Co., Inc.***, 104 Wn.2d 710, 721, 709 P.2d 793 (1985)).

The Court of Appeals erred in refusing to apply the "catch-all" statute of limitations in this case. While there is no statute of limitations for an action to quiet title, ***Petersen v. Schafer***, 42 Wn. App. 281, 284, 709 P.2d 813 (1985), *rev. denied*, 105 Wn.2d 1011 (1986), this was not an action to "remove a cloud" from plaintiff's title, RCW 7.28.010, but a statutory claim to create an encumbrance on the property of a stranger. The policies at issue are directly contrary to those underlying the quiet title rule. Allowing parties to assert statutory claims for easements of necessity 35 years after the necessity is created would not remove clouds to

title, but would create them. *See* ***Kobza v. Tripp***, 105 Wn. App. 90, 95, 18 P.3d 621 (2001) (purpose of quiet title action is to remove uncertainty by compelling those claiming an interest in property to "come forward and assert their right or claim").

Since June 1971, the Ruvalcabas knew that they had no access to their property. They did nothing for 35 years, as other adjacent parcels that provided them with access went on the market and were sold to others. (*See* CP 279-82, 345-46)[6] Their private condemnation claim would clearly be time-barred under RCW 4.16.130, or for that matter, any other applicable statute of limitations. Regardless whether the statute would run against a good faith purchaser, allowing an owner who himself has voluntarily landlocked his property to sue his neighbors for access in perpetuity creates uncertainty in land titles, and undermines settled expectations. RAP 13.4(b)(4).

2. Laches Bars A Private Condemnation Claim Brought 37 Years After Accrual.

Even if the private condemnation statute were exempt from a limitations period, the Court of Appeals erred in refusing to hold that

[6] Eight adjacent parcels provide access to a public road from the Ruvalcabas' property. (App. B) One was on the market as late as April 2009, when this action was pending in the trial court. (CP 279-82)

the doctrine of laches bars the Ruvalcabas' claim because of their unreasonable delay in asserting it:

> The elements of this defense, which its proponent has the burden proving, consist of: (1) knowledge by plaintiff of the facts constituting a cause of action or reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to the defendant resulting from the delay in bringing the action.

Hayden v. City of Port Townsend, 93 Wn.2d 870, 874-75, 613 P.2d 1164 (1980).

The passage of 37 years has undoubtedly prejudiced the Day Petitioners in establishing whether it was unreasonable for the Ruvalcabas to obtain an implied easement over the Severed Parcel at the time of their conveyance in 1971.[7] Similarly, the delay also defeats landowners' reasonable and settled expectations, as had the Ruvalcabas acted promptly the Day Petitioners would have had notice of the issue before purchasing their properties and could have adjusted their purchase prices accordingly.

Allowing such unreasonable delay prejudices litigants and undermines the reasonable economic expectations of Washington

[7] For instance, petitioners do not know when the garage was built on the Severed Parcel, and thus whether that structure interfered with the Ruvalcabas' ability to obtain an easement over the Severed Parcel at the time of their original conveyance. (CP 210)

property owners. *See* ***Davidson v. State***, 116 Wn.2d 13, 26-27, 802 P2d 1374 (1991) (62 year delay in challenging harbor line barred by laches). Even if the Court of Appeals correctly construed RCW 8.24.010 to allow a private condemnation claim by an owner who has voluntarily landlocked property, its failure to impose any temporal limits on such statutory claims is an issue that this Court should address and resolve. RAP 13.4(b)(4).

C. Request For Fees.

Pursuant to RAP 18.1(b), petitioners renew their request for attorney fees made in the Court of Appeals. (Day Resp. Br. 44)

VI. CONCLUSION

This Court should grant review, reverse the Court of Appeals and reinstate the trial court's dismissal of this action.

Dated this 2nd day of March, 2011.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355

PEPPLE JOHNSON CANTU & SCHMIDT PLLC

By: _____
Jackson Schmidt
WSBA No. 16848

Attorneys for Petitioners

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 2, 2011, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ✓ Messenger ___ U.S. Mail ___ E-Mail
Pierre E. Acebedo Acebedo & Johnson, LLC 1011 East Main, Suite 456 Puyallup, WA 98372	___ Facsimile ✓ Messenger ___ U.S. Mail ✓ E-Mail
Timothy J. Graham Hanson Baker Ludlow Drumheller P.S. 2229 - 112th Avenue NE, Suite 200 Bellevue, WA 98004-2936	___ Facsimile ✓ Messenger ___ U.S. Mail ✓ E-Mail
Jackson Schmidt Pepple Johnson Cantu & Schmidt PLLC 1501 Western Ave Ste 600 Seattle WA 98101-3521	___ Facsimile ✓ Messenger ___ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 2nd day of March, 2011.

Tara D. Friesen

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROGELIO H. A. RUVALCABA and ELAINE H. RUVALCABA, husband and wife, Appellants, v. KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and ARNE S. IJPMA and SIEW LOON, husband and wife, and JOHN A. DYER and PAULINE T. DYER, husband and wife, and STEVEN J. DAY and CATHERINE L. DAY, husband and wife, and LIVINGSTON ENTERPRISES, LLC, an Alabama limited liability company, and KAREN M. OMODT, a single woman, and MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife, and CARL E. JOHNSON and PHYLLIS JOHNSON, husband and wife, and WILLIAM V. KITCHIN and CHERYL L. KITCHIN, husband and wife, Respondents, KAREN KLEPPER, a single woman, Defendant.	NO. 63572-7-I DIVISION ONE PUBLISHED OPINION FILED: January 31, 2011

LEACH, A.C.J. — This case presents an issue of first impression in Washington, whether a landowner may condemn a private way of necessity after

voluntarily landlocking his property. Rogelio and Elaine Ruvalcaba appeal a trial court's decision that they may not condemn a private way of necessity under RCW 8.24.010 because they previously landlocked their land by severing and selling that part of their property with public road access without reserving access across it.[1] They also appeal an award of attorney fees to the current owners of the severed parcel.

Because RCW 8.24.010 entitles any landowner to condemn a way of necessity upon a showing only of a need of the way for the land's "proper use and enjoyment," Ruvalcabas' earlier conveyance does not operate to legally bar this action. Instead, it constitutes one fact to be considered by the trier of fact with all other relevant facts to decide whether Ruvalcabas have made the showing of necessity required by the statute. And, because Ruvalcabas did not seek to condemn any part of the severed parcel, the trial court erred in awarding fees to its current owner. We reverse and remand for further proceedings.

FACTS

In 1965, the Ruvalcabas purchased land in northeast Seattle. Steep slopes divide the property into upper western and lower eastern portions. The eastern portion abuts and has access to 42nd Avenue NE, which runs in a north-south direction. The western portion is surrounded on the north, west, and south sides by residential property. Additional residential properties to the north

[1] This is the second time that these parties have appeared before this court. See Ruvalcaba v. Kwang Ho Baek, noted at 140 Wn. App. 1021, 2007 WL 2411691.

separate the Ruvalcabas' property from nearby NE 135th Street. NE 135th Street runs in an east-west direction.

In 1971, the Ruvalcabas sold the eastern portion (severed parcel) without reserving access over it to the remainder of their property. They claim that they did not reserve access because of the lack of any practical route, due to the topography of the property. Before the conveyance, the Ruvalcabas tried to create an access corridor to NE 135th Street by negotiating easements with their northerly neighbors but secured only some of the easements they needed. In 1991, the Ruvalcabas revived these negotiations to no avail. Consequently, the western parcel has remained landlocked since 1971.[2]

In 2005, GeoEngineers, Inc., conducted a geotechnical evaluation of the landlocked parcel and concluded that the construction of a residence on the west parcel was feasible. The Ruvalcabas again renewed their efforts to negotiate easements to NE 135th Street, and again they were unsuccessful. They then sued owners of properties located between their land and NE 135th Street, alleging a single cause of action, seeking to establish an implied easement by necessity across their properties.

In response to the defendants' motion to dismiss, the Ruvalcabas moved to amend their complaint to join additional neighbors whose properties, together with those of the named defendants, would provide access to NE 135th Street.

[2] Although the property was sold in 1971, the conveyance apparently was not recorded until 1972.

The Ruvalcabas also sought to amend their complaint to add a claim for condemnation of a way of necessity. They did not, however, seek to join the current owners of the severed parcel, William and Cheryl Kitchin.

The trial court denied the motion to amend and dismissed the case with prejudice as time-barred by the applicable statute of limitations. We affirmed in part, holding that the Ruvalcabas' original cause of action failed to state a proper claim.[3] We also stated that the Ruvalcabas "must first seek a declaratory judgment determining that access through the [severed parcel] is unreasonable" before seeking to privately condemn their neighbors' land.[4]

In July 2008, the Ruvalcabas filed this private condemnation action against a group of property owners collectively referred to as the "Day Group." They also sought determinations that the easements obtained in 1971 remained valid and that access over the severed parcel was unreasonable. But they did not join the Kitchins.

Citing our earlier opinion, the Day Group moved to compel joinder of the Kitchins. After the trial court granted the motion, the Ruvalcabas amended their complaint to add the Kitchins as additional defendants. In their amended complaint, the Ruvalcabas asked the court to declare that access across the severed parcel was unreasonable or, alternatively, "that there exists an implied

[3] Ruvalcaba, 2007 WL 2411691, at *2.
[4] Ruvalcaba, 2007 WL 2411691, at *3.

easement by necessity over the severed parcel into what now constitutes Defendant Kitchin's property."

The Day Group then moved for summary judgment and asked for attorney fees under chapter 8.24 RCW. The Kitchins joined the Day Group's motion in part and moved separately for summary judgment. The Kitchins, however, did not include in their motion any request for attorney fees. In separate orders, the trial court granted summary judgment to all defendants and awarded them attorney fees. The court relied on cases from other jurisdictions, English Realty Co. v. Meyer[5] and Graff v. Scanlan,[6] to conclude that "one cannot create, by one's own action of landlocking one's property, the 'reasonable necessity' that is an element of the plaintiffs' case in a private condemnation of a way by necessity." The court decided that the Ruvalcabas' intentional failure to timely use, occupy, and possess any portion of the severed parcel after 1971 extinguished any potential common law right to an implied easement by necessity over the Kitchins' property.

Ruvalcabas appeal.

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[5] 228 La. 423, 433, 82 So. 2d 698 (1955) (landowner not entitled to condemn a private road over adjoining land where enclosure is direct consequence of act of party seeking relief).

[6] 673 A.2d 1028, 1033 (Pa. Commw. Ct. 1996) (landowners who voluntarily create their own landlock are precluded from condemning a private road over another's property).

STANDARD OF REVIEW

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court.[7] Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.[8] The interpretation and applicability of a statute also presents questions of law reviewed de novo.[9]

ANALYSIS

In a matter of first impression, we must decide whether a grantor who knowingly landlocks property through the voluntary segregation and sale of a portion of the property later may use Washington's private condemnation statute to acquire access.[10]

While the Washington Constitution generally prohibits the taking of private property for private use, article I, section 16 expressly allows private property to be taken to create "private ways of necessity."[11] This constitutional provision is

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[7] Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

[8] CR 56; Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001).

[9] Quality Food Ctrs. v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

[10] In Olivo v. Rasmussen, 48 Wn. App. 318, 319-20 738 P.2d 333 (1987), the court addressed the issue of whether a landowner could condemn a private way of necessity after the settlement of the State's eminent domain landlocked the property. Because pending litigation did not produce Ruvalcabas' conveyance, Olivo is factually distinguishable and of only limited guidance.

[11] Article I, section 16 of the Washington Constitution provides, "Private property shall not be taken for private use, except for private ways of necessity."

not self-executing. The legislature has declared the conditions under which private property may be condemned for this purpose in chapter 8.24 RCW.[12] The pertinent provision, RCW 8.24.010, states,

> An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity . . . . The term "private way of necessity," as used in this chapter, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads.

But because the taking of private property without a public benefit is a remedy of last resort, courts strictly construe this statute.[13]

Washington does not require that the need for a way of necessity be absolute.[14] Instead, the way must be reasonably necessary under the facts of the case,[15] as distinguished from being merely convenient or advantageous.[16] The "condemnor has the burden of proving the reasonable necessity for a private way of necessity, including the absence of alternatives."[17]

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[12] Brown v. McAnally, 97 Wn.2d 360, 366, 644 P.2d 1153 (1982).

[13] Beeson v. Phillips, 41 Wn. App. 183, 186, 702 P.2d 1244 (1985).

[14] Brown, 97 Wn.2d at 367 (citing State ex rel. Polson Logging Co. v. Superior Court, 11 Wn.2d 545, 562-63, 119 P.2d 694 (1941)).

[15] Brown, 97 Wn.2d at 367 (citing Poison Logging Co., 11 Wn.2d at 562-63).

[16] Brown, 97 Wn.2d at 367 ("necessity" as used in RCW 8.24.010 is determined under the facts of the case); State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson, 25 Wn.2d 499, 503-04, 171 P.2d 189 (1946) ("necessity" under REM. REV. STAT. § 936-1, predecessor statute to RCW 8.24.010, is determined according to all the circumstances).

[17] Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009) (citing State ex rel. Carlson v. Superior Court, 107 Wash. 228, 234, 181 P. 689 (1919)).

The Day Group contends the Ruvalcabas' requested access is not reasonably necessary because the Ruvalcabas knowingly, voluntarily, and willfully landlocked their property. Because no Washington case directly supports this claim, the Day Group urges this court to follow English Realty and Graff. The courts in those cases refused to grant a private way of necessity because the voluntary acts of the party seeking to condemn access over the land of another created the need for the access.

In response, the Ruvalcabas contend that their conveyance of the severed parcel does not, as a matter of law, bar relief under RCW 8.24.010.[18] They contend that English Realty has little persuasive value since Louisiana courts have limited it to its facts.[19] They also attempt to factually distinguish English Realty and Graff. They assert that the plaintiff in English Realty appears to have had an alternate access available and that the property topography in Graff did not make reservation of access impractical.

English Realty and Graff provide only persuasive authority to this court[20] and little guidance for the construction of a Washington statute implementing a provision of our state constitution. When interpreting a statute, our primary

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[18] The Ruvalcabas do not appeal the court's rejection of an implied easement by necessity across the severed parcel.

[19] See, e.g., Rockholt v. Keaty, 256 La. 629, 639, 237 So.2d 663 (1970).

[20] In re Pers. Restraint of Crace, 157 Wn. App. 81, 98 n.7, 236 P.3d 914 (2010) (appellate courts bound only by decisions from Washington Supreme Court and nonsupervisory decisions from the United States Supreme Court).

objective is to ascertain the legislature's intent,[21] beginning with the statute's plain meaning.[22] We discern plain meaning from the ordinary language used and will not add words where the legislature has not included them.[23] We assume that the legislature means exactly what it says.[24]

The Day Group essentially asks the court to write into RCW 8.24.010 a clean hands threshold requirement not included by the legislature. The Day Group asks the court to limit the availability of relief under chapter 8.24 RCW to a smaller group of landowners than that described by the legislature in the statute, any "owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity."[25] The Day Group has not identified any ambiguity in RCW 8.24.010 or suggested any reason why we should decide that the legislature meant something different than what it said. We reject the invitation to usurp the role of the legislature and write into RCW 8.24.010 language addressing a policy decision properly made by the legislature.

The legislative history of chapter 8.24 RCW supports our decision. The legislature has imposed limitations upon the relief available under chapter 8.24

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[21] Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 229 P.3d 791 (2010) (quoting Arborwood Idaho, LLC v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004)).

[22] Kennedy v. Martin, 115 Wn. App. 866, 868, 65 P.3d 866 (2003).

[23] Lake, 169 Wn.2d at 526 (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

[24] Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

[25] RCW 8.24.010.

RCW as it has determined appropriate. For instance, when alternative routes for a way of necessity exist, the legislature has mandated the priorities for courts to use when selecting a route.[26] Also, when the provisions of chapter 8.24 RCW are used to acquire a right-of-way for a logging road, the condemnor is required to carry and convey timber and other produce from the land through which the road is acquired at reasonable prices.[27] The failure to do so terminates the right-of-way.[28]

The very concept of reasonable necessity, as contrasted with absolute necessity, suggests a fact-driven inquiry generally to be decided on a case-by-case basis. The facts of this case illustrate why. The availability and value, as a home site, of the property retained by Ruvalcabas may have changed dramatically between 1971 and the present. This in turn may have impacted the economic feasibility of constructing a road over the severed parcel over the same period of time. Since 1971 the costs and techniques for building roads up steep slopes relative to land values may also have changed.

In conclusion, we hold that a property owner's conveyance severing legal access to a parcel does not bar a private condemnation action under RCW 8.24.010. Instead, it is a fact to be weighed with all other relevant evidence to determine the reasonable need for a way of necessity.

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[26] See RCW 8.24.025.
[27] RCW 8.24.040.
[28] RCW 8.24.040.

The Ruvalcabas also challenge the trial court's award of attorney fees to the Kitchins. The trial court awarded fees and costs to the Kitchins because it found that they were "necessary parties to plaintiffs' private condemnation claims." In Washington, a court has no authority to award attorney fees in the absence of a contract, statute, or recognized ground of equity providing for fee recovery.[29] According to the Ruvalcabas, the statute under which the court awarded fees and costs, RCW 8.24.030, does not apply because the Kitchins were never potential condemnees. We agree.

RCW 8.24.030 states, "In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee." This statute has been construed to authorize an award to both condemnees and potential condemnees.[30] Because the statute does not define the term "condemnee," we may resort to dictionary definitions to give the word its ordinary meaning.[31] Black's Law Dictionary defines a condemnee as "[o]ne whose property is expropriated for public use or taken by a public works project."[32] In a private condemnation action, the term means one whose property is expropriated or taken for private use. Thus, RCW 8.24.030

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[29] Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

[30] Kennedy, 115 Wn. App. at 872-74.

[31] Beckman v. Wilcox, 96 Wn. App. 355, 363-64, 979 P.2d 890 (1999).

[32] BLACK'S LAW DICTIONARY 332 (9th ed. 2009).

authorizes a fee award to any property owner whose property potentially could have been expropriated for a private use in the pending action.

The Ruvalcabas never sought to condemn any part of the Kitchins' property. Instead, as an alternative to their condemnation action against the Day Group, they requested a declaration that an implied easement by necessity existed across the severed parcel. This common law claim requested a declaration of existing rights and burdens between adjacent parcels as opposed to an expropriation or taking of property. The Kitchins cite no authority for the proposition that they were potential condemnees in this case. Under these circumstances, we hold that they are not entitled to a fee award under RCW 8.24.030, as a matter of law.[33]

Mere joinder of Ruvalcabas' claims against the Kitchins with the condemnation does not justify the fee award. Although our prior decision required the Ruvalcabas to resolve the reasonableness of access across the severed parcel, their claims for a common law implied easement and for private condemnation remain separate and distinct causes of action. A defendant joined in a lawsuit involving multiple causes of action may not recover fees simply because fees are statutorily authorized for a claim not asserted against that

[33] The parties debate whether Noble applies. However, RCW 8.24.030 applies in that case as the only cause of action asserted against the adjoining property owner was a statutory condemnation claim. Safe Harbor Family Pres. Trust v. Noble, noted at 120 Wn. App. 1060, 2004 WL 569290, at *4, *6. Because Noble does not involve a common law implied easement claim, it provides no precedent controlling this case.

defendant. This is consistent with the general rule that when fees are recoverable for some, but not all, of a party's claims, a fee award must segregate the time expended on claims for which fees are authorized.[34] The trial court erred in awarding fees.

Both the Ruvalcabas and the Day Group request fees and costs on appeal. Because Ruvalcabas' entitlement to a way of necessity remains unresolved, we deny these requests as premature. The Kitchins also request attorney fees on appeal. But, as explained above, they are not entitled to a fee award under RCW 8.24.030. Therefore, we deny their request.

CONCLUSION

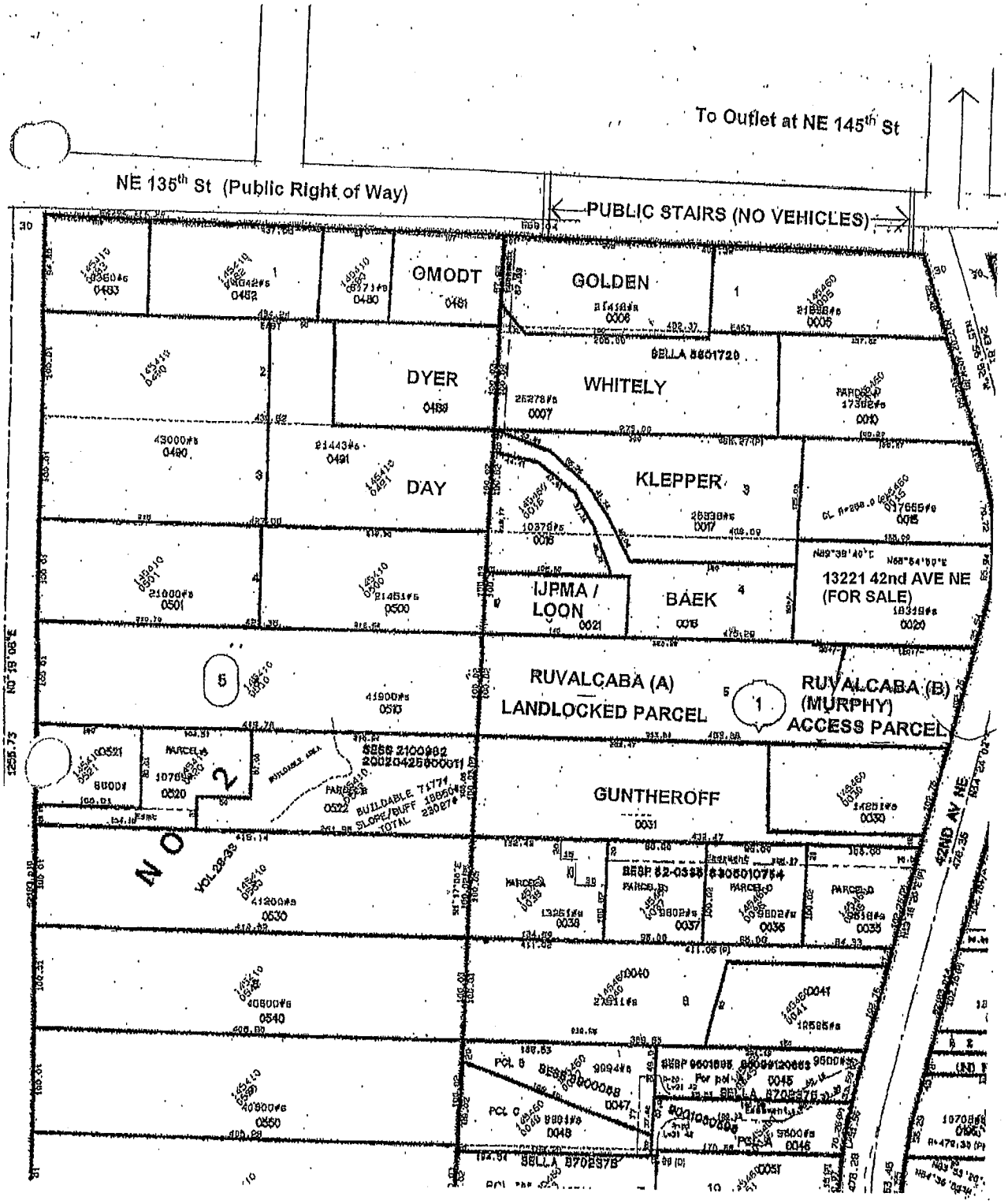
Because a landowner's action landlocking its property does not as a matter of law preclude that party from later seeking relief under RCW 8.24.010, we reverse the trial court's summary judgment in favor of the Day Group. We also reverse the award of attorney fees to the Kitchins because they were never potential condemnees under RCW 8.24.030. We remand for further proceedings consistent with this opinion.

Leach, A.C.J.

WE CONCUR:

Schindler, J. Becker, J.

[34] Boguch v. Landover Corp., 153 Wn. App. 595, 619-20, 224 P.3d 795 (2009).


To Outlet at NE 145th St
NE 135th St (Public Right of Way)
PUBLIC STAIRS (NO VEHICLES)
OMODT
GOLDEN
DYER
WHITELY
DAY
KLEPPER
IJPMA / LOON
BAEK
13221 42nd AVE NE (FOR SALE)
RUVALCABA (A) LANDLOCKED PARCEL
RUVALCABA (B) (MURPHY) ACCESS PARCEL
GUNTHEROFF
42ND AV NE

App. B

Not Reported in P.3d, 140 Wash.App. 1021, 2007 WL 2411691 (Wash.App. Div. 1)
(Cite as: 2007 WL 2411691 (Wash.App. Div. 1))

H

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.
Rogelio H.A. RUVALCABA, and Elaine H. Ruvalcaba, husband and wife, Appellants,
v.
KWANG HO BAEK and Lyung Sook Baek, husband and wife, and Arne S. Ijpma, and Siew Loon, husband and wife, and John A. Dyer and Pauline T. Dyer, husband and wife, and Stephen Klepper and Karen Klepper, husband and wife, and Catherine L. Day and Steve J. Day, wife and husband, and Arthur Whiteley, a single person, Respondents.

No. 58877-0-I.
Aug. 27, 2007.

Appeal from King County Superior Court; Honorable Michael J. Fox, J.
Pierre E Acebedo, Acebedo & Johnson LLC, Puyallup, WA, for Appellants.

Jackson Schmidt, Attorney at Law, Seattle, WA, for Respondents.

UNPUBLISHED OPINION

GROSSE, J.

*1 A common law easement by necessity is only available over land severed by the grantor. Ingress or egress can be acquired over the land of strangers only by an action for private condemnation. Rogelio and Elaine Ruvalcaba brought an action under common law seeking to quiet title in easements of necessity against strangers to the severed property. As such, their complaint failed to state a claim upon which relief could be granted. That portion of the trial court's summary judgment is affirmed.

However, the trial court determined that the statute of limitations barred actions for both a common law easement by necessity and one for private condemnation. The trial court should have declined to address the limitations issue in the summary proceeding. That portion of the judgment, including dismissal with prejudice based on the statute of limitations, is reversed.

Motions to join necessary parties and to amend the complaint are addressed to the sound discretion of the trial court. Given the posture of this case, the trial court did not abuse its discretion in denying the motions to join or amend. The summary judgment is affirmed in part and reversed in part.

FACTS

Rogelio and Elaine Ruvalcaba purchased land in 1965. The property's topography had a definite lower portion and upper portion, separated by a steep slope. The lower portion of the property abutted, and had access to, 42nd Avenue N.E. In 1971, the Ruvalcabas sold the lower portion of the property to Melvin and Arlene Desermeaux.[FN1] However, at that time the Ruvalcabas failed to reserve access to the upper portion of the property. They believed such access was impractical both physically and economically due to the natural features of the land.

FN1. The record reveals Melvin and Arlene Desermeaux are no longer the owners of the property. However, it is not clear who currently owns the property. We will refer to the property owners as Desermeaux or their successors.

Prior to the conveyance of the lower portion, the Ruvalcabas attempted to negotiate a number of easements for access to the upper portion of the property. They succeeded in procuring easements from some of their neighbors but did not complete access to a public right of way. The Ruvalcabas were unable to negotiate other easements to gain

access to the upper portion. In March 1972, the conveyance from the Ruvalcabas to Desermeaux was filed. As a result, the upper portion of the land became landlocked. The Ruvalcabas neither obtained a declaratory judgment that ingress or egress over the Desermeaux' property was unreasonable, nor did they seek an easement by necessity over the severed parcel owned by Desermeaux or their successors.

The land remained undeveloped for more than thirty years. The Ruvalcabas claim they discovered the property was amenable to development in 2005, so once again they decided to seek access. After self-rendering the property landlocked and failing to procure sufficient easements some thirty years before, the Ruvalcabas asked for the grant of easements over neighboring property, but their requests were denied by a number of the neighboring property owners. Eventually the Ruvalcabas sued a number of the adjoining and non-adjoining property owners to the north for the easements. The complaint alleged a single cause of action, one in common law, seeking to quiet title in an implied easement by necessity across properties of neighbor-defendants.

***2** The neighbor-defendants brought a motion for summary judgment seeking dismissal of the claim. They initially argued the law does not recognize an easement by necessity except over the parcel actually severed. In addition, the defendants argued the common law claim was time-barred and that any condemnation action, had one been raised, would also be barred by the statute of limitations.

In response to the defendants' motion, the Ruvalcabas sought to amend their complaint to add as additional parties other neighbors whose properties, in conjunction with the other defendants, would reach a public thoroughfare. However, they did not seek to add Desermeaux or their successors. In addition, the Ruvalcabas sought to amend the complaint to add a statutory private condemnation claim for a way of necessity.

The trial court granted summary judgment dismissal for the neighbor-defendant landowners. In its order, the trial court found that the Ruvalcabas knew all of the elements of a claim for a common law implied easement by necessity and a statutory private condemnation for necessity, and that those claims fully accrued as of June 1971. Accordingly, the trial court held that both claims were time barred due to the Ruvalcabas delay in bringing an action. Thereafter, the trial court denied the Ruvalcabas' motion to amend their complaint and dismissed the action with prejudice. From the order, the Ruvalcabas appeal.

ANALYSIS[FN2]

FN2. This is a review of a summary judgment. The usual standard of review applies. CR 56(c); *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (summary judgment appropriate if there is no genuine issue of material fact and moving party entitled to judgment as a matter of law); *Degel v. Majestic Mobile Manor, Inc.,* 129 Wn.2d 43, 48, 914 P.2d 728 (1996) (reviewing summary judgment by engaging in same inquiry as trial court); *Michak v. Transnation Title Ins. Co.,* 148 Wn.2d 788, 794, 64 P.3d 22 (2003) (viewing facts of case and reasonable inferences drawn therefrom in light most favorable to nonmoving party); *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (nonmoving party must set forth specific facts to defeat motion for summary judgment); *Wendle v. Farrow,* 102 Wn.2d 380, 382, 686 P.2d 480 (1984) (sustaining trial court's judgment on any theory established by pleadings and supported by proof).

The Ruvalcabas' initial complaint alleged only a common law implied easement by necessity. "The doctrine of easement by necessity is based on the policy that landlocked land may not be rendered useless and the landlocked owner is entitled to the

beneficial uses of the land." [FN3]

FN3. *Kennedy v. Martin,* 115 Wn.App. 866, 868, 63 P.3d 866 (2003) (citing *Hellberg v. Coffin Sheep Co.,* 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965)).

But, under the common law, an implied easement by necessity is found only across a parcel of land that has been severed from a larger parcel by a common owner because the easement is based on a legal fiction that the owner of the entire parcel would have recorded an easement before severing the parcel. An easement implied from necessity may exist only between parcels of land that were once one parcel and were severed from each other. [FN4] Thus, in this case an action seeking a common law easement implied from necessity could only have been brought by the Ruvalcabas against Desermeaux or their successors. Desermeaux or their successors are not, however, named as defendants in the original complaint. For that reason, the original cause of action fails to state a proper claim, and the trial court's dismissal of the action was appropriate.

FN4. 17 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW 2.5, at 93-94 (2d ed.2004) (citing *Todd v. Sterling,* 45 Wn.2d 40, 273 P.2d 245 (1954)); *Leinweber v. Gallagher,* 2 Wn.2d 388, 98 P.2d 311 (1940).

The common law claim for a way of necessity should not be confused with the statutory procedure for a way of necessity.[FN5] It is evident from the record that the claims were confused. The original complaint sought only to gain a common law easement of necessity. The easement sought was over land owned by neighbors who were strangers to the original parcel owned by the Ruvalcabas. But to accomplish a way of necessity over land owned by strangers to the severed land an action must be brought pursuant to statute, RCW 8.24 .010. Here, it was not.

FN5. Private condemnation to establish a way of necessity is allowed by the Washington State Constitution article I, section 16 (amend.9) and implemented by statute, RCW 8.24.010.

***3** The Ruvalcabas' argument that an easement of necessity through the severed parcel is not reasonable or economically feasible due to the topography is misplaced. Even with appropriate supporting geological and engineering reports the Ruvalcabas' argument that this easement is unreasonable does not automatically render it so. The determination whether access is "reasonable" necessarily has to be adjudicated through declaratory judgment, or averred and proved in conjunction with a private condemnation action, before any way of necessity is granted to benefit the landlocked property through properties *other* than the severed parcel.[FN6]

FN6. 17 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW 2.5, at 96 (2d ed.2004) ("private condemnation statute is a remedy of last resort, a fallback for a landowner who has no other reasonable means of access").

In response to the motion for summary judgment, the Ruvalcabas requested to amend their complaint to add parties and to add a claim for private condemnation under the statute. The trial court denied the motion to amend and dismissed the case with prejudice. The Ruvalcabas contend the trial court abused its discretion by denying their motion to amend.

Generally, Civil Rule (CR) 20 allows for amendment of a complaint to join necessary parties. [FN7] Further, CR 15(a) permits a party to amend a pleading by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires, except where prejudice to the opposing party results.[FN8] The decision to

grant leave to amend the pleadings is left to the discretion of the trial court.[FN9] Therefore, when reviewing the court's decision to deny the motion to amend, we apply a manifest abuse of discretion test.[FN10]

FN7. *See Wells v. Aetna Ins. Co.,* 60 Wn.2d 880, 882, 376 P.2d 644 (1962) (purpose of permitting liberal joinder is to encourage adjudication of rights and claims of all parties in one proceeding).

FN8. *Del Guzzi Constr. Co. v. Global Northwest, Ltd.,* 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

FN9. *Wilson v. Horsley,* 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

FN10. *McDonald v. State Farm Fire & Cas. Co.,* 119 Wn.2d 724, 737, 837 P.2d 1000 (1992) (citing *Herron v. Tribune Publ'g Co.,* 108 Wn.2d 162, 165, 736 P.2d 249 (1987)); *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons").

The touchstone for the denial of a motion to amend is the prejudice an amendment would cause to the nonmoving party. Factors that courts have considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion.[FN11] Here the record shows that permitting the amendment would substantially prejudice the neighbor-defendants. First there would be an additional delay. The Ruvalcabas would need to get a declaratory judgment holding that a common law way of necessity over the Desermeaux' property was not reasonable, or further amend to include that contention. Yet, here, the Ruvalcabas have not sought to add Desermeaux or their successors to the action. Granting the motion would have the effect of broadening the issues and necessitating expensive discovery and other potential legal fees and costs to the neighbor-defendants as well as to the Ruvalcabas. The dollars behind these expenses are likely better spent by the Ruvalcabas to negotiate the purchase of easements needed to gain access, something they would be required to do in a private condemnation action in any event. Only if they fail to reach mutual agreement on a purchase of a way of access should they consider a private condemnation action. But before they file a private condemnation action, the Ruvalcabas must first seek a declaratory judgment determining that access through the property severed from their once owned parcel is unreasonable.

FN11. *Herron,* 108 Wn.2d at 165-66.

***4** We conclude that the trial court did not abuse its discretion in denying the joinder of additional parties or the Ruvalcabas' motion to amend their complaint.

That said, however, we disagree with the basis used by the trial court to grant portions of the summary judgment and the reason for dismissal *with* prejudice. The trial court should not have determined the issues on the basis of the application of the statute of limitations. It was unnecessary to determine the limitations issue in order to dismiss the original action or the motions to join or amend. Application of the limitations issue is best left to another day. While the delay here in bringing a statutory action seeking a private way of necessity was egregious, the public policy to prevent landlocked property from being rendered useless may override the application of any limitations statute.[FN12] But this is an issue of first impression in the state and it deserves a fully developed record as well as argument and briefing. We decline to determine the issue on this summary record as it is inappropriate. Therefore we hold the trial court erred in dismissing the actions with prejudice.

FN12. *See Brown v. McAnally,* 97 Wn.2d 360, 367, 644 P.2d 1153 (1982) ("[Washington Constitution article I, section 16] (amend.9) and RCW 8.24.010 declare a public policy against rendering landlocked property useless.").

The summary judgment is affirmed in part and reversed in part.

WE CONCUR: DWYER, and COX, JJ.

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